DAVID R. EBERHART (S.B. #195474)
deberhart@omm.com
SHARON M. BUNZEL (S.B. #181609)
sbunzel@omm.com
COLLEEN M. KENNEDY (S.B. #227107)
ckennedy@omm.com
O'MELVENY & MYERS LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111
Telephone: (415) 984-8700
Facsimile: (415) 984-8701

Attorneys for Plaintiff eBay Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EBAY INC.,

Plaintiff,

v.

DIGITAL POINT SOLUTIONS, INC., SHAWN HOGAN, KESSLER'S FLYING CIRCUS, THUNDERWOOD HOLDINGS, INC., TODD DUNNING, DUNNING ENTERPRISE, INC., BRIAN DUNNING, BRIANDUNNING.COM, and DOES 1-20,

Defendants.

Case No. C 08-04052 JF

CONSOLIDATED OPPOSITION OF EBAY INC. TO (1) THE MOTIONS TO DISMISS THE SECOND AMENDED COMPLAINT BY DEFENDANTS DIGITAL POINT SOLUTIONS, INC., SHAWN HOGAN, THUNDERWOOD HOLDINGS, INC., KESSLER'S FLYING CIRCUS, BRIAN DUNNING, BRIANDUNNING.COM, TODD DUNNING, AND DUNNING ENTERPRISE, INC. ; AND (2) THE MOTIONS TO TRANSFER BY DEFENDANTS DIGITAL POINT SOLUTIONS, INC., SHAWN HOGAN, TODD DUNNING AND DUNNING ENTERPRISE, INC.

Hearing Date: June 26, 2009
Time: 9:00 a.m.
Judge: Hon. Jeremy Fogel

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I. INTRODUCTION

eBay's Second Amended Complaint ("SAC") remedies each of the deficiencies specified in the Court's February 24, 2009 Order. Recognizing that fact, Defendants have abandoned their prior contentions that eBay has failed to state a CFAA claim and failed to allege sufficient particularity for a RICO or common law fraud claim. Instead, Defendants' current motions consist primarily of new arguments that seek to escape the consequences of their illegal "cookie stuffing" schemes.[1] These arguments are without merit.

All Defendants raise the new argument that the SAC should be dismissed based on a limitations provision in the purported Publisher Service Agreement ("PSA") between Defendants and non-party Commission Junction ("CJ"). That argument fails for four independent reasons. First, Defendants have created factual disputes regarding the validity of the PSA and made it inappropriate for consideration on a motion to dismiss. Specifically, after the Court issued the February 24, 2009 Order, a number of Defendants disavowed the PSA in their litigation with CJ in Orange County Superior Court (the "CJ Action"), and in both this case and the CJ Action Defendants served discovery responses that dispute the existence, terms, and validity of any agreement with CJ. Second, Defendants' assumption that the PSA was terminated, thereby triggering the limitations provision, is misplaced. This fact cannot be assumed on a motion to dismiss, and discovery obtained to date—as well as certain Defendants' positions taken in the CJ Action—suggests that any contractual relationship with CJ was not terminated. Third, the text of the limitations language that Defendants hope to enforce does not apply to third parties such as eBay. And fourth, Fed. R. Civ. P. 12(g) bars this argument because it could have (and should have) been made during the first round of motions to dismiss.

---

[1] Four separate motions have been filed by Defendants: (1) the Motion to Dismiss by Kessler's Flying Circus, Thunderwood Holdings, Inc., Brian Dunning and BrianDunning.com (hereinafter "KFC Mot."); (2) the Motion to Dismiss and to Transfer Venue by Todd Dunning and Dunning Enterprise, Inc. (hereinafter "TD Mot."); (3) the Motion to Dismiss by Digital Point Solutions, Inc. and Shawn Hogan (hereinafter "DPS Mot."); and (4) the Motion to Transfer by Digital Point Solutions, Inc. and Shawn Hogan (hereinafter "DPS Transfer Mot."). In the interests of efficiency, and pursuant to the Court's June 3, 2009 order, eBay has consolidated its opposition to these motions, which raise several common issues, in a single brief.

Incredibly, Defendants Kessler's Flying Circus, Thunderwood Holdings, Inc., Brian Dunning and BrianDunning.com (the "KFC Defendants") and Defendants Todd Dunning and Dunning Enterprise, Inc. (the "TD Defendants") also try to argue that their recent settlement with CJ—of a lawsuit to which eBay was not a party—released all claims in this litigation. They make this argument even though eBay had no notice (much less any participation) in such a settlement. And CJ was not acting as eBay's agent in reaching that settlement. The settlement cannot be used to bar eBay's claims.

The TD Defendants also argue that eBay's claims are barred by various statutes of limitations. But Defendants' active concealment and false denial of the existence of their fraudulent schemes tolled the applicable statutes of limitations under the doctrines of delayed discovery and fraudulent concealment. Moreover, this argument is barred by Fed. R. Civ. P. 12(g).

All Defendants renew their claim that eBay's Complaint is governed by the forum selection clause in the PSA. But Defendants have created a factual dispute regarding the enforceability of any PSA, which renders any such agreement inappropriate for consideration on a motion to dismiss. Moreover, the amended allegations in the SAC amply demonstrate that the User Agreements provided the only authorization for access to eBay's site and are the primary and controlling agreements for all claims in the SAC.

Finally, Defendants Shawn Hogan and Digital Point Solutions, Inc. (the "DPS Defendants") along with the TD Defendants argue that this case should be transferred pursuant to 28 U.S.C. § 1404(a) to the Central District of California. But none of these Defendants has met their burden to justify transfer, where the Northern District was selected by eBay and provides at least an equally convenient forum for all parties and witnesses.

Defendants' motions should therefore be denied in their entirety.

II. SUMMARY OF KEY FACTS

The essential facts of Defendants' massive cookie stuffing schemes are unchanged from the initial complaint. Over the course of at least three years, Defendants engaged in sophisticated schemes to wrongfully obtain advertising commissions from eBay by making it appear that potential customers were intentionally visiting eBay's website by clicking on ads for eBay. But Defendants did not legitimately drive users to eBay's site. Instead, Defendants caused a massive number of users' computers to access eBay's computers without any user clicking on an eBay ad or even becoming aware that their computer had been used by Defendants to access the eBay site. (SAC ¶ 25.) Defendants' access to eBay's computers through unwitting users caused a cookie to be stuffed on each user's computer, and was unauthorized by the terms of the User Agreements entered into by each of the individual Defendants—the only agreements that authorize Defendants to access eBay's site. (*Id.* ¶¶ 25-26.) When a user with a stuffed cookie later went to eBay on their own accord and registered as a new eBay user or purchased an item, eBay paid a commission to Defendants even though they did nothing to earn it. (*See id.* ¶¶ 25, 27.)

Defendants employed technological measures designed to prevent eBay from discovering their schemes and lied to eBay about their actions. (*Id.* ¶¶ 29-32, 60.) The schemes only ended when eBay undertook a multi-pronged investigation of Defendants' activity in June 2007. (*See id.* ¶¶ 53-56.) Shortly thereafter, the FBI seized Defendants' computer equipment as part of an investigation into whether Defendants' fraudulent activities also constitute federal crimes. That investigation continues.

In January 2008, CJ filed a breach of contract action against some of the KFC Defendants in Los Angeles County Superior Court (the "CJ Action"). eBay was not a party to the CJ Action, and that lawsuit involved rights and damages that are entirely separate from the rights asserted and damages alleged by eBay here. In that case, CJ sought to recover a single disbursement of monies that it had paid to KFC as commissions for one month in 2007. (Compendium of Exs. to KFC Mot. [hereinafter "Compendium"], Ex. 8 ¶¶ 15-17.) Because eBay never reimbursed CJ for that payment, eBay suffered no damage by virtue of that payment and does not seek any recovery for that payment in this litigation. After Defendants forced a transfer of the CJ Action to Orange County Superior

Court, Defendants settled with CJ on the eve of trial, without the knowledge or participation of eBay.[2] (Compendium, Ex. 10 ¶ 1.)

III. ARGUMENT

A. The PSA's Contractual Limitations Period Does Not Bar eBay's Claims

1. Defendants Disavow the PSA and Create an Issue of Fact as to Its Enforceability

Several aspects of the current motions to dismiss rely on an unsigned PSA submitted with Defendants' papers. But shortly after this Court's February 24, 2009 Order on the FAC, Defendants placed the authenticity of that document in question. Accordingly, the PSA may not be considered on these motions to dismiss.

First, the TD and KFC Defendants disavowed the very same PSA on which they now rely. In the CJ Action, the TD and KFC Defendants asserted both that there was no evidence that the PSA was a binding agreement and that there were material inconsistencies between the date of the PSA and the date on which KFC joined CJ's program. Those assertions—combined with the absence of any evidence establishing that the PSA is a binding agreement—create a question of fact as to whether the unsigned PSA attached as an exhibit to all Defendants' motions to dismiss reflects the true terms and conditions of any agreement between Defendants and CJ.

On March 6, 2009, the TD and KFC Defendants filed a "Joint Trial Brief," that, under the section entitled "Anticipated Legal and Evidentiary Issues for Trial" stated:

> **No contract between CJI and Kessler's was produced.**
>
> CJI has never produced during pretrial discovery a copy of a contract that Kessler's "accepted" for participation in CJI's affiliate marketing program. CJI attached to its Second Amended Complaint a copy of a Publisher Service Agreement ("PSA") dated in June 2005, ***but this date is several months after CJI's own records show, and the Second Amended Complaint claims, that Kessler joined the***

[2] Because they seek to establish the truth of matters stated in documents, eBay opposes the KFC Defendants' and DPS Defendants' requests for judicial notice of "the content of" the CJ settlement and the "entire case file" of the CJ Action, respectively. *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) (judicial notice inapplicable to reasonably disputable facts).

> ***program.*** CJI has not provided evidence of the applicable PSA, or Kessler's "acceptance" in April 2005, and therefore ***CJI cannot meet its evidentiary burden of proving the terms of a binding contract*** and CJI cannot prove the terms allegedly breached by Kessler's.

(Kennedy Decl. Ex. 1 at 3 (emphasis added).) Now, after claiming the PSA was invalid, they attempt to rely on the same document to dismiss eBay's claims. (*See* Compendium, Ex. 2; Decl. of Stewart H. Foreman, Ex. 1; Decl. of Ross M. Campbell, Ex. 1.) The Court should not countenance such brazen gamesmanship.

Defendants have also disclaimed possession of any binding agreement with CJ in discovery responses served in both this action and the CJ Action. In this action, each of the Defendants responded to eBay's discovery requests for "[a]ll documents relating to Commission Junction, including all agreements, terms of service and terms and conditions," (Kennedy Decl. Ex. 2 at 7), by stating either that they had no such documents in their possession or by refusing to answer based on their Fifth Amendment right against self-incrimination.[3] (*See* Kennedy Decl. Ex. 3 at 11 ("KFC does not have any responsive documents in its possession, custody or control."); Ex. 4 at 11 (same); Ex. 5 at 11 (same); Ex. 6 at 9 (same); Ex. 7 at 10 ("Defendant objects to this request on the grounds that it violates Defendant's privilege against self-incrimination."); Ex. 8 at 9 (same); Ex. 9 at 11 (same); Ex. 10 at 10 ("Mr. Hogan, as the sole shareholder of the Defendant ... has invoked his privilege against self-incrimination.").) Moreover, when responding to eBay's Requests for Admission, both KFC and DPS denied that they ever participated in an eBay marketing program. (Kennedy Decl. Ex. 11 at 6; Ex. 12 at 5.)

Similarly, in the CJ Action both KFC and Todd Dunning responded to CJ's request for "[a]ny and all written agreements or contracts between You and CJI" by stating that they had no such documents in their possession. (Kennedy Decl. Ex. 13 at 3; Ex. 14 at 3.) Further, Todd Dunning's response included the statement that he "***does not know of*** . . . any written agreement or contract between him and CJI." (*Id.* (emphasis added).) In sum, not one of the Defendants has produced a copy of any PSA in either action, let alone a PSA to which they claim to be party. Notably, none of Defendants' four motions actually asserts that the June 2005 version of the PSA upon which they all rely is an operative agreement to which they are a party, nor does any Defendant submit any evidence that they ever accepted the PSA that they are now seeking to enforce against eBay.

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[3] In resolving Defendants' motions to dismiss, this Court is entitled to draw adverse inferences from Defendants' invocation of their rights under the Fifth Amendment and refusal to respond to eBay's inquiries. *SEC v. Kornman*, 391 F. Supp. 2d 477, 494-95 (N.D. Tex. 2005) (applying adverse inference rule to deny motion to dismiss where defendant invoked Fifth Amendment right against self-incrimination); *Jackson v. Microsoft Corp.*, 211 F.R.D. 423, 433 (W.D. Wash. 2002) (applying adverse inference rule to grant motion to dismiss where plaintiff invoked Fifth Amendment right against self-incrimination).

As Defendants concede, a court ruling on a motion to dismiss may only consider matters outside the complaint "for which authenticity is not questioned and on which the complaint necessarily relies." (KFC Mot. at 14; TD Mot. at 10); *see also Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). The PSA attached to Defendants' motions no longer meets that standard. That the PSA "has previously been accepted and relied on by this Court," (KFC Mot. at 14; TD Mot. at 11), is irrelevant in light of Defendants' recent disavowals that call into question the authenticity and enforceability of the PSA. Defendants' statements have, at the very least, created a contested issue of fact that must be resolved, if at all, through discovery. On this basis alone, Defendants' motions to dismiss based on the PSA's contractual limitations clause must be denied.

2. There Is No Evidence of Termination of the PSA

All of Defendants' motions to dismiss depend on the assumption that the contested PSA was terminated. But eBay has never alleged that the PSA was terminated, and there is no evidence establishing such a termination (which evidence, in any event, would not be appropriate for the Court to consider on a motion to dismiss). And because the PSA, on its face, appears to be a "master agreement" that would relate to participation in affiliate programs with third parties other than eBay, there is no reason to assume that the end of Defendants' participation in eBay's AMP resulted in the termination of the PSA.

As Defendants point out, the PSA clause at issue purports to prevent actions "against ***the other party*** to this agreement more than one year after the termination ***of this***

agreement." (Compendium, Ex. 2 ¶ 7(e) (emphasis added).) As an initial matter, eBay is not a "party" to the PSA and—even if eBay is considered a third-party beneficiary—it is not bound by the clause in question. (*See* Section (A)(3), below.) But even assuming that the limitations clause somehow applies to eBay, the SAC does not allege that the PSA between Defendants and CJ has been terminated and there is no evidence of such a termination. Therefore the clause has not been triggered.

Defendants attempt to obscure the issue by arguing that the provision was invoked when "eBay terminated the [] Defendants from its Affiliate Marketing Program on June 19, 2007." (KFC Mot. at 15; *see also* DPS Mot. at 11.) But Defendants' affiliate relationship with eBay is not synonymous with the PSA. The PSA is not specific to eBay's AMP, but instead provides for a relationship between Defendants and CJ through which Defendants may participate in programs with any number of "Advertisers" (such as—but not limited to—eBay) who seek the services of affiliates to drive web traffic in exchange for commissions. (*See* Compendium, Ex. 2, Introduction, ¶ 2.) Thus, any termination from eBay's AMP would have no bearing on the status of Defendants' separate contractual relationship with CJ.[4]

Further, while the TD Defendants assert that "eBay terminated Kessler's from the AMP and the PSA on or about June 18, 2007," (TD Mot. at 12), the SAC contains no such allegation regarding the PSA. And as a non-party (even if a third-party beneficiary), eBay is entirely without authority to terminate any contractual relationship between the Defendants and CJ. *See Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal. App. 4th 949, 959-60 (2005) (without an assignment of contract rights, third-party beneficiary cannot rescind the contract to which he was not a party). Further, the PSA's termination provision explicitly states that the contract may only be terminated "by either party."

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[4] In fact, the SAC does not even contain the allegation that Defendants were terminated ***from eBay's Affiliate Marketing Program*** on June 19, 2007. Although the KFC Defendants cite to paragraph 57 of the SAC for this proposition (KFC Mot. at 15), neither that paragraph nor any other contains any such statement. Paragraph 57 of the SAC states only that Defendants' cookie stuffing continued "through June 18, 2007." Nor is there an allegation of termination in the Complaint in the CJ Action. (*See* Compendium, Ex. 8.)

(Compendium, Ex. 2, ¶ 6(a).)

That the PSA could not be terminated by eBay is further supported by a provision in the PSA that explains the effect of a "Termination by Advertiser." (*Id.* ¶ 6(b).) In that provision, the PSA explains that an Advertiser (like eBay) has the right to terminate a Publisher "from the Advertiser's Program" but does not provide for termination by an Advertiser of the PSA itself. (*Id.*) By contrast, CJ was explicitly given the right to terminate either the PSA itself or a Publisher's involvement in an individual Advertiser's Program, showing that the PSA's drafters clearly understood the distinction between termination of the entire PSA and termination of the relationship with a single Advertiser, and chose to give only the latter to Advertisers. (*Id.* ¶ 6(c).) Because the PSA did not provide an Advertiser with the right to terminate the PSA, eBay had no such right.

Not only does the SAC lack any allegation of termination, eBay is not aware of any evidence establishing that the PSA was terminated. In fact, the TD and KFC Defendants repeatedly admitted in the CJ Action that their contractual relationship with CJ ***was not*** terminated on June 18 or 19, 2007, if it was ever terminated. For example, KFC's Cross-Complaint against CJ in the CJ Action states that, after June 20, 2007, "Kessler's continued to provide promotional activities for the benefit of CJI and eBay" but "CJI has failed and refused to pay Kessler's for its work in June 2007 ***and thereafter*** although CJI and eBay received the benefits of Kessler's promotional activities," and that CJ "***purported*** to terminate the contract for Kessler's promotional activities" on June 27, 2007, but that "Kessler's promotional activities for the benefit of CJI and eBay in June 2007 ***and thereafter*** would have resulted in payment to Kessler's under the contract of at least $1,000,000 or more." (Kennedy Decl. Ex. 15 ¶¶ 12-14 (emphasis added).)

In this action, eBay issued Requests for Production to all Defendants and subpoenas to CJ and its counsel requesting, among other things, all documents related to any purported termination of the PSA. (Kennedy Decl. Exs. 16, 17.) In response to those requests, certain Defendants produced several documents, and CJ and its counsel produced a large volume of documents, purportedly including the entire case file from the

CJ Action. But those productions from Defendants and CJ contained ***no documents*** establishing any termination of the PSA at any time.[5] In light of the complete lack of evidence on this point, the purported termination of the PSA between Defendants and CJ is, at the very least, a question of fact inappropriate to a motion to dismiss.[6]

3. The PSA's Limitations Provision Does Not Apply to eBay

On its face, the putative PSA's limitations provision does not apply to third parties such as eBay. The full text of Section 7(e) of the PSA makes clear that it is intended to apply to claims between CJ and Defendants, and not to claims by third parties:

> ANY OBLIGATION OR LIABILITY OF CJ UNDER THIS AGREEMENT SHALL BE LIMITED TO THE TOTAL OF YOUR PAYOUTS PAID TO YOU BY CJ UNDER THIS AGREEMENT DURING THE YEAR PRECEDING THE CLAIM. NO ACTION, SUIT OR PROCEEDING SHALL BE BROUGHT AGAINST THE OTHER PARTY TO THIS AGREEMENT MORE THAN ONE YEAR AFTER THE TERMINATION OF THIS AGREEMENT. YOU AGREE THAT CJ SHALL NOT BE LIABLE TO YOU, OR ANY THIRD PARTY (INCLUDING BUT NOT LIMITED TO A CLAIM BY ANOTHER PUBLISHER OR AN ADVERTISER OF THE NETWORK SERVICE), FOR ANY CONSEQUENTIAL, EXEMPLARY, SPECIAL, INCIDENTAL, OR PUNITIVE DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOSS OF GOODWILL, LOST PROFITS, BUSINESS INTERRUPTION, LOSS OF PROGRAMS OR OTHER DATA, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR CLAIM.

(Compendium, Ex. 2 ¶ 7(e).)

Several aspects of this clause indicate that it should not be read to apply to third parties. First, the use of the words "brought against **the other party** to this agreement" in the provision is an explicit statement that the clause applies only to suits between the parties to the agreement, not to suits involving third parties. This is in stark contrast to the language of the PSA's forum selection clause, which purports to apply to "any actions related to this Agreement" rather than any actions between the parties to the agreement. (*Id.* ¶ 9(d).) Second, the one-year limitation language is immediately preceded by a limitation of monetary liability against CJ, but the paragraph provides no similar limitation of liability as against any third party such as eBay. Third, the final sentence of the paragraph contains a damages limitation that applies to "any third party"—language that is absent from the sentence regarding the limitations period. This reference demonstrates that the parties knew how to affect third-party rights when they intended to do so, and indicates that their failure to do so when drafting the limitations period was intentional. *See Wolf v. Walt Disney Pictures & Television*, 162 Cal. App. 4th 1107, 1135-36 (2008) (parties' inclusion of subsidiaries in one portion of the contract but not in another portion indicated that "[w]hen the parties intended to identify 'subsidiaries,' they knew how to do so").

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[5] In the late afternoon of the filing deadline for this brief, eBay's counsel received responses from each of the KFC Defendants, sent via regular mail, which indicated that responsive documents "will" be produced "at a time and place mutually convenient to the parties." Insofar as the KFC Defendants failed to make a timely production of any documents, eBay bases this statement on productions made to date.

[6] Even if the Court chose to convert Defendants' motions into motions for summary judgment, discovery is still required for facts essential to a summary judgment ruling—including facts surrounding any purported termination of the PSA between CJ and Defendants—thereby rendering summary judgment inappropriate. *See* Fed. R. Civ. P. 56(f), Kennedy Decl. ¶¶ 2-4.

Even if eBay were a third-party beneficiary to an established PSA, its terms should not be enforced against eBay because eBay does not assert third-party beneficiary rights in this action. In *Comer v. Micor, Inc.*, the Northern District stated that it would not enforce an arbitration clause against a plaintiff because, assuming the plaintiff were a third-party beneficiary under the relevant agreements, the plaintiff was not suing for breach of those agreements.

> Plaintiff himself is not suing for breach of contract; that is, he is not suing to enforce the terms of the Agreements, but instead to enforce the Plans' rights via-a-vis their fiduciaries under ERISA. [Defendant], however, is indeed seeking to enforce the arbitration provisions of the Agreements against Plaintiff. ***Thus, the relevant issue is not whether Plaintiff can avail himself of the benefits of the Agreements in his capacity as third-party beneficiary, but whether the Agreements can be enforced against Plaintiff. . . . [T]he Agreements cannot be enforced against Plaintiff as a third-party beneficiary, at least in the absence of his suing to enforce the terms of the Agreements.***

278 F. Supp. 2d 1030, 1040-41 (N.D. Cal. 2003) (emphasis added), *aff'd*, 436 F.3d 1098

(9th Cir. 2006). Like the plaintiff in *Comer*, eBay has not asserted a breach of contract claim. eBay's situation is also distinguishable from *TAAG*, because that plaintiff brought breach of contract claims and conceded that the forum selection clause was applicable to its claims (although unreasonable as applied). *See TAAG Linhas Areas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1352-53 (9th Cir. 1990).

The DPS Defendants argue that the PSA's contractual limitations provision was incorporated by reference into the T&C Supplement and, therefore, the termination of the affiliate relationship between eBay and Defendants triggered the PSA's limitations provision. But the T&C Supplement does not incorporate the PSA by reference and, more importantly, it does not state that eBay is bound by the PSA. Instead, it states that the affiliates (such as Defendants) "agree to comply with" the PSA.[7] (Compendium, Ex. 3 at 0000642.) And even if, contrary to fact, this were "incorporation by reference," it would not rewrite the PSA's limitations provision, which is triggered by termination of "this agreement" (that is, the PSA). As Defendants point out, a contractual provision must be interpreted in its "ordinary and popular sense." *Perez-Encinas v. AmerUs Life Ins. Co.*, 468 F. Supp. 2d 1127, 1133 (N.D. Cal. 2006); KFC Mot. at 15; TD Mot. at 11. Thus, even if the clause were incorporated by reference into the T&C Supplement, its only potential application would be to bar claims filed more than a year after the termination of ***the PSA***. In all 12 pages of their argument seeking to demonstrate that the PSA's contractual limitations provision applies here, the DPS Defendants never acknowledge this discrepancy nor provide any authority that would allow Defendants to re-write the clause in their favor. (*See* DPS Mot. at 10-22.)

The DPS Defendants next contend that eBay must have intended that the PSA's contractual limitations period apply to eBay's claims because there is no such limitations period in the "T&C Supplement" that Defendants attach to their motions.[8] (DPS Mot. at

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[7] Nor does any Defendant state that they actually agreed to any T&C Supplement with eBay.

[8] As discussed above, Defendants improperly assume in their motions that the parties entered into an agreement despite their recent disavowals of such an agreement. But even assuming that this agreement were effective, it would not trump the User Agreements that govern eBay's

19.) But that baseless contention is undermined by the structure of the PSA itself. The PSA's limitations provision quoted above reflects a multi-part bargain between CJ and Defendants in which the parties agreed to limit their liability and damages, and also to limit the time in which they could sue. Thus, CJ had only a year in which to sue Defendants after any termination, and Defendants limited their damages against CJ in exchange. As noted above, third parties were specifically excluded from this bargain.

Moreover, this multi-part bargain is fundamentally inconsistent with the terms in the T&C Supplement. The Supplement contains specific language regarding the remedies available to eBay in connection with an affiliate's breach of the terms of that relationship. But it contains ***no statement*** regarding any limitations on the amount of time in which eBay may pursue such remedies. (Compendium, Ex. 3, § 14.) This provision is consistent with the parties' intention to exclude eBay from the specific bargain struck between CJ and Defendants. So because eBay does not share in the benefit received by CJ via the PSA's express limitation of Defendants' damages, eBay should not then be restricted by the PSA's limitations period.

Finally, the PSA's limitations provision must be strictly construed against Defendants. *See Lewis v. Hopper*, 140 Cal. App. 2d 365, 367 (1956) (contractual limitations provisions that limit the right to sue to a period shorter than granted by statute should be construed with strictness against the party invoking them). And any evidence of the supposed intent of contracting parties cannot be used to rewrite unambiguous contractual language.[9] *See Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 391 (2006).

Because the language of the PSA's limitations provision and other relevant contractual language make clear that the limitations provision was intended to apply only to suits between parties to the PSA itself, the provision does not bar eBay's claims.[10]

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relationships with Defendants and form the fundamental basis for eBay's claims. *See* Section (D)(2), below.

[9] In addition, any such factual inquiry is inappropriate on a motion to dismiss.

[10] This purported ground for dismissal is also procedurally flawed insofar as it is raised for the first time in this successive motion to dismiss. As discussed in Section (F), below, Defendants'

B. The Settlement Between CJ and Defendants Did Not Release eBay's Claims

Having failed to consolidate eBay's claims against them with the claims raised by CJ in the CJ Action, (*see* Kennedy Decl. Ex. 18), and having subsequently obtained a cheap settlement with CJ in that lawsuit, the KFC and TD Defendants now make the incredible claim that their settlement with CJ also bars all claims pending against them in this litigation. (KFC Mot. at 16-19; TD Mot. at 12 n.11.)

Defendants' argument rests on the assertion that CJ is "eBay's agent for the purposes of eBay's Affiliate Marketing Program," (KFC Mot. at 16), and therefore, that the release given by CJ in the settlement agreement also released all claims of eBay. (*Id.* at 17.) Defendants have the burden to prove the existence of any agency relationship, *Burbank v. Nat'l Cas. Co.*, 43 Cal. App. 2d 773, 781 (1941), yet they fail to provide any legal or factual basis for the bald assertion that CJ was "eBay's acknowledged agent" for the purposes of the settlement.[11] (*See* KFC Mot. at 17.) This is unsurprising because CJ was not eBay's agent for purposes of resolving eBay's disputes with affiliates and did not release eBay's claims.

1. CJ Was Not eBay's Actual Agent

CJ was not acting as eBay's actual agent when CJ settled its own claims against Defendants. Under California law, actual agency exists when the agent is employed by the principal, and can arise through either express agreement or conduct. Cal. Civ. Code § 2299; *Van't Rood v. County of Santa Clara*, 113 Cal. App. 4th 549, 571 (2003). CJ was never eBay's agent for litigation purposes and Defendants have provided no evidence to the contrary.

The only relevant agreement between CJ and eBay specifically confines the scope

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use of seriatim motions is improper under Federal Rule of Civil Procedure 12(g), and the motion based on the PSA's limitations provision can be denied on that basis alone.

[11] Although the KFC Defendants cite to the SAC for this proposition, no portion of the SAC supports this notion. The SAC alleges that eBay used CJ's services in administering the AMP (SAC ¶ 20), but nowhere "acknowledges" an agency relationship with CJ, especially for purposes of releasing or settling any of eBay's claims against Defendants.

of their relationship to the administration of eBay's AMP. (Kennedy Decl. Ex. 19, ¶ 5.) The section of the Master Advertiser Service Agreement ("MSA") detailing the services CJ will provide for eBay explains that CJ will: track and report to eBay critical information about affiliates' activities, pay affiliates on behalf of eBay, manage tax information for the AMP, provide promotional services for the AMP, service eBay's advertising links, and provide customer support services for eBay. (*Id.* ¶¶ 4.8, 5.) That agreement expressly precludes CJ from binding eBay "in any respect whatsoever" unless specifically authorized by the agreement, and nothing therein suggests that CJ is eBay's agent in litigation. (*Id.* ¶ 12.3.)

In addition, nothing in eBay's conduct could be construed as creating an agency relationship. To create an agency by conduct, the principal must have control over the agent. *Emery v. Visa Int'l Serv. Ass'n*, 95 Cal. App. 4th 952, 960 (2002); *Edwards v. Freeman*, 34 Cal. 2d 589, 592 (1949) ("In the absence of the essential characteristic of the right of control, there is no true agency"). eBay was not a party to CJ's suit against Defendants, and eBay asserted no control over CJ in either the conduct of that action or in the negotiation and execution of the agreement that settled it. Defendants provide no contrary evidence, and they do not even attempt to assert that eBay participated in the settlement negotiations or that there was any indication that eBay controlled CJ in those negotiations.

Without either an agreement creating an agency relationship for litigation purposes or any evidence that eBay exerted the requisite control over CJ in connection with the CJ Action, CJ was not eBay's agent when CJ settled its lawsuit against Defendants.[12]

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[12] Even assuming that CJ could have been considered eBay's actual agent, CJ had no authority to settle eBay's claims against Defendants. An actual agent can have two kinds of authority: "actual authority," which "stems from the conduct of the principal which causes the *agent* to reasonably believe that the principal has consented to the agent's act," or "ostensible authority" resulting "from conduct of the principal which leads the *third party* reasonably to believe that the agent is authorized to bind the principal." *Meyer v. Ford Motor Co.*, 275 Cal. App. 2d 90, 101-02 (1969) (emphasis added). For the reasons stated above, CJ could not have thought it had actual authority to settle eBay's claims. Similarly, for the reasons discussed in the next section, no conduct of eBay could have led Defendants to reasonably believe that CJ was authorized to bind eBay such that CJ could have had ostensible authority to settle those claims.

2. CJ Was Not eBay's Ostensible Agent

Nor did CJ act as eBay's ostensible agent for purposes of any settlement. To establish ostensible agency, Defendants must demonstrate: 1) that they had a reasonable belief that CJ was acting as eBay's agent for settlement; 2) that Defendants' belief was the product of "some act or neglect" by eBay; and 3) that Defendants were not negligent in failing to investigate the scope of CJ's authority. *See Hill v. Citizens Nat'l Trust & Sav. Bank*, 9 Cal. 2d 172, 176-77 (1937); *Seneca Ins. Co. v. County of Orange*, 117 Cal. App. 4th 611, 620 (2004). Defendants have failed even to attempt to demonstrate such grounds.

First, Defendants have presented no evidence that they actually believed that CJ was acting as eBay's agent in releasing claims against Defendants, nor could they have had any such reasonable belief. Defendants were well aware at the time that they entered into the settlement agreement with CJ that eBay had an entirely separate complaint pending against them, with independent claims that sought independent damages. (*See* eBay Opp. at 3.)[13] Defendants were also aware that eBay was not present for and did not participate in any settlement negotiations. Notably, Defendants have not asserted that eBay's claims were ever discussed during negotiations regarding settlement of the CJ Action, or that CJ made any representations about their authority to release eBay's claims.

Moreover, Defendants could not possibly have believed that eBay would release its claims without receiving any benefit. Defendants cannot seriously contend that the $25,000 settlement payment accepted by CJ for its $565,517.84 damages claim—none of which was to be paid to eBay—was also meant to compensate eBay for the millions of dollars in damages it suffered over the multi-year period of the KFC Defendants' fraudulent scheme. As explained in the Third Restatement of Agency, "[T]he agent's position as a fiduciary should prompt doubt in the mind of the reasonable third party when

[13] "eBay Opp." refers to eBay's Consolidated Opposition to the Motions to Dismiss the First Amended Complaint by Defendants Thunderwood Holdings, Inc., Brian Dunning, BrianDunning.com, Todd Dunning, Dunning Enterprise Inc. and Kessler's Flying Circus, filed on November 21, 2008.

the agent appears to be using authority to bind the principal to a transaction that will not benefit the principal." Restatement (Third) of Agency § 2.03(d) (2006). Defendants could have had no reasonable belief that CJ was acting as eBay's agent.

Second, any belief on Defendants' part that CJ was acting as eBay's agent in releasing claims against Defendants was not "generated by some act or neglect" of eBay. *Hill,* 9 Cal. 2d at 176-77; *Emery,* 95 Cal. App. 4th at 961 (holding that "ostensible authority must be based on the acts or declarations of the principal and not solely upon the agent's conduct"). To the contrary, eBay has repeatedly stated that the CJ Action is entirely separate from eBay's case. (*See, e.g.*, eBay Opp. at 3 ("eBay does not own or control CJ, and [the CJ Action] . . . has no bearing on eBay's case. It involves rights and remedies that are entirely separate from the action before the Court, and none of the damages sought by eBay overlap with the damages sought by CJ."); *see also* eBay Opp. at 19-20.)

Third, any reliance by Defendants on CJ to settle eBay's case without investigating the scope of CJ's authority was negligent. As noted by the California Supreme Court, "persons dealing with an assumed agent . . . are bound at their peril, if they would hold the principal, to ascertain not only the fact of the agency but the nature and extent of the authority. . . ." *Hill,* 9 Cal. 2d at 177. In light of eBay's complete lack of participation in the prosecution[14] and settlement of the CJ litigation and eBay's clear statements to this Court regarding the separateness of that litigation, Defendants had a duty to investigate whether CJ had authority to settle eBay's claims, if in fact they truly believed that to be the case. That the Defendants made no inquiry into CJ's authority in this matter was negligent, and underscores the *post hoc* nature of their current claims.

Defendants have failed to meet their burden of demonstrating that CJ acted as eBay's actual or ostensible agent in settling the CJ Action, and their contention that CJ's settlement agreement with them was effective to release eBay's claims should be denied.

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[14] eBay produced documents and a witness in the CJ Action, but only pursuant to subpoena. (Kennedy Decl. Exs. 33, 34.)

C. eBay's Claims Are Not Barred by Statutes of Limitations

The TD Defendants' statute of limitations argument[15] fails because both the discovery rule and the doctrine of fraudulent concealment render eBay's claims timely. eBay's claims against Defendants did not accrue until they were discovered by eBay, and the very nature of Defendants' schemes as pled in the SAC prevented eBay from suspecting their existence before that discovery. Further, Defendants actively engaged in the fraudulent concealment of their wrongdoing through technological measures, false statements to eBay as to how their business models worked, and, when questions arose, outright denials of wrongdoing, thereby tolling the applicable statutes of limitations. The TD Defendants cannot meet the high burden to show that a claim is barred based on the statute of limitations as a matter of law since this cause of action is generally an issue of fact. The burden is especially high here because eBay has pled facts that satisfy the requirements for tolling the statutes of limitations under two independent doctrines.

1. eBay's Causes of Action Accrued Under the Discovery Rule

eBay's claims against Defendants accrued based on the "discovery rule."[16] Under this rule, "the statute of limitations does not begin to run until the plaintiff discovered or had notice of all facts which are essential to the cause of action." *In re Conseco Ins. Co. Annuity Mktg. & Sales Practices Litig.*, 2008 WL 4544441, at *8 (N.D. Cal. Sept. 30, 2008). "The discovery rule may be applied to breaches which can be, and are, committed

[15] This statute of limitations argument was not raised in the first round of motions to dismiss, and therefore is procedurally as well as substantively deficient. As discussed in Section (F), below, Defendants' use of seriatim motions to raise successive grounds for dismissal is improper under Federal Rule of Civil Procedure 12(g), and the motion based on statute of limitations arguments can be denied on that basis alone.

[16] *See* Cal. Civ. Proc. Code § 338(d) (accrual of fraud claims occurs when the aggrieved party discovers the facts constituting the fraud); 18 U.S.C. § 1030(g) (accrual of CFAA claim occurs on the date of the discovery of the damage); *Shade v. Gorman*, 2009 WL 196400, at *3 (N.D. Cal. Jan. 28, 2009) (same); *Pincay v. Andrews*, 238 F.3d 1106, 1109 (9th Cir. 2001) (accrual of civil RICO claim occurs when a plaintiff knows or should know of the injury that underlies his cause of action); Cal. Penal Code § 502(e)(3) (accrual occurs on the date of the act complained of, or the date of the discovery of the damage, whichever is later); *Broberg v. Guardian Life Ins. Co.*, 171 Cal. App. 4th 912, 920-21 (2009) (applying discovery rule to § 17200 claim and noting that, while there is some disagreement among the appellate courts, application is "the better view"); 3 Witkin, Cal. Procedure (5th ed. 2008), § 656, at 867 (a quasi-contract action to recover money obtained by fraud is governed by the fraud statute of limitations).

in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time." *El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032, 1039 (9th Cir. 2003). Moreover, courts have recognized that "just what facts should have made a 'reasonably prudent' person suspicious may be a close question not suitable for resolution in a motion to dismiss." *Low v. SDI Vendome S.A.*, 2003 WL 25678880, at *3 (C.D. Cal. Jan. 7, 2003); *see also Lubin v. Sybedon Corp.*, 688 F. Supp. 1425, 1434 (S.D. Cal. 1988) ("As the Ninth Circuit recognized … fact questions are usually involved in the determination of when and whether a plaintiff discovered the violation.").

Under this rule, the facts pled in the SAC establish that eBay's claims did not accrue until well after Defendants' "cookie stuffing" schemes began. Defendants' schemes were concealed within apparently legitimate business operations, were specifically designed to be very difficult to detect, and made it appear that commissions paid were legitimately earned through eBay's AMP. (SAC ¶¶ 25, 29-32.) All of these aspects of Defendants' schemes prevented eBay from reasonably suspecting that any wrongdoing was occurring or that it had any claims against Defendants until the schemes were finally uncovered in June 2007.

eBay was not required to do more to discover its claims because "[t]he requirement of diligence is only meaningful . . . when facts exist that would excite the inquiry of a reasonable person." *Conmar Corp. v. Mitsui & Co.*, 858 F.2d 499, 504 (9th Cir. 1988). No such facts existed here. The TD Defendants' claim that "starting in April 2004 eBay had data and information that showed 'cookie stuffing'" is highly misleading. (*See* TD Mot. at 13.) eBay had no reason to conduct an analysis of Defendants' operations and no ability to understand what an analysis would show until after eBay discovered how Defendants' schemes operated. In other words, the data was only meaningful after the fraud was uncovered. Second, and contrary to Defendants' claims, the historical analysis performed by eBay did not entail just "look[ing] in its database to see the allegedly obvious statistical anomalies." (*Id.* at 16.) Instead, it involved a complex analysis of a very specific piece of information (the time between when a cookie was dropped and when a Revenue Action was generated), the aggregation of that information into various statistical pools of data (Revenue Actions generated by legitimately-referred users as opposed to referrals from the two schemes) and a comparison of those pools of data to determine whether anomalies existed. (*See* SAC ¶ 57.)

In the context of a breach of contract action (where breach and, hence, accrual will generally be obvious), the discovery rule applies when defendants' "misrepresentations and fraud" make the cause of action "difficult for [the plaintiff] to detect" because "defendants should not be allowed to knowingly profit from their injuree's ignorance." *El Pollo Loco*, 316 F.3d at 1039-40 (internal quotations omitted). That eBay was able to use historical data to go back and reconstruct evidence of cookie stuffing that occurred *before* it had any reason to suspect wrongdoing does not demonstrate that it was or should have been aware of such wrongdoing at the time. Such a conclusion would effectively eviscerate the discovery rule, because in every case to which the rule applies, the plaintiff eventually discovers evidence of prior wrongdoing.

But application of the discovery rule asks when the plaintiff had reason to know or suspect that it had a cause of action against the defendant. Here, eBay had no reason to try to parse through the massive amount of raw data in its possession in order to discover wrongdoing by Defendants, who hid their schemes with sophisticated techniques and provided ready explanations for any anomalies. *In re Rubber Chems. Antitrust Litig.*, 504 F. Supp. 2d 777, 788 (N.D. Cal. 2007) ("Plaintiffs are not under a duty continually to scout around to uncover claims which they have no reason to suspect they might have.") (quoting *In re Coordinated Pretrial Proceedings in Petroleum Antitrust Litig.*, 782 F. Supp. 487, 489 (C.D. Cal. 1991)).[17]

The TD Defendants further claim that eBay was on notice because "Todd Dunning allegedly admitted the 'cookie-stuffing' to an eBay employee." (TD Mot. at 14.) But this is neither what occurred nor what the SAC alleges: Todd Dunning reported that DPS and Hogan were cookie stuffing and that Brian Dunning was ***not*** cookie stuffing. (SAC ¶ 60.) Thus, that statement could not have alerted eBay to wrongful activity by the Dunnings. In any event, Todd Dunning later retracted the statement. (*Id.*) Mr. Dunning's subsequent retraction of his statement, coupled with the lack of any other evidence that had been uncovered by eBay at that point suggesting wrongdoing by the DPS Defendants, eliminated any reasonable suspicion of wrongdoing. *El Pollo Loco*, 316 F.3d at 1040 (quoting *Storage Servs. v. Oosterbaan*, 214 Cal. App. 3d 498, 508 (1989)). It was reasonable for eBay to rely on Dunning's retraction of his statement and cannot now be used to infer a lack of diligence.[18] In light of these allegations, Defendants have failed to meet their burden of showing that, as a matter of law, eBay's claims began to accrue "at the time the 'cookie stuffing' started." (TD Mot. at 20.)

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[17] And even if the Court found that eBay should have conducted such an investigation in 2005 or some time thereafter, the statute of limitations would not immunize Defendants' illegal access transpiring in the later years of the schemes because those subsequent illegal acts are independently actionable.

2. The Statutes of Limitations Were Tolled by Defendants' Fraudulent Concealment

Even if the TD Defendants could demonstrate that eBay was aware of facts that would trigger the requirement of diligence (which they cannot), the doctrine of fraudulent concealment also tolls the statutes of limitations due to Defendants' concealment of their wrongdoing. "A defendant's fraud in concealing a cause of action against him will toll the statute of limitations, and that tolling will last as long as a plaintiff's reliance on the misrepresentations is reasonable." *In re Conseco Ins. Co.*, 2008 WL 4544441, at *8 (quoting *Grisham v. Philip Morris U.S.A., Inc.*, 40 Cal. 4th 623, 744 (2007)).

As with the discovery rule, fraudulent concealment is an issue of fact and "a defendant has an extremely difficult burden to show that [fraudulent concealment

[18] The TD Defendants also briefly mention the SAC's reference to a 2005 inquiry by CJ employee Christine Kim to Shawn Hogan about suspicions of possible cookie stuffing by DPS. This inquiry: (1) gave eBay no reason to believe that the TD Defendants were engaged in wrongdoing; and (2) was immediately addressed by Defendant Shawn Hogan's false assurances that the anomaly arose from a "coding error" that he had fixed. (SAC ¶ 60.)

allegations are] barred as a matter of law." *In re Petroleum Prods.*, 782 F. Supp. at 489 (quoting *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1417 (9th Cir. 1987)); *see also Lubin*, 688 F. Supp. at 1435 (on motion to dismiss, the "sole question before the court is whether plaintiffs have pleaded fraudulent concealment"); *Low*, 2003 WL 2567880, at *5 ("[A]pplicability of the fraudulent concealment doctrine is likely to require a fact-intensive inquiry.").

The TD Defendants cannot meet this "extremely difficult burden." As described above, the SAC alleges that the Defendants engaged in self-concealing fraudulent schemes that "did not give rise to any facts that would put [eBay] on inquiry notice." *In re Rubber Chems.*, 504 F. Supp. 2d at 788; *see also Lubin*, 688 F. Supp. at 1435 (fraudulent concealment pled where "the essence of [the] Complaint is precisely the same fraud which allegedly concealed defendants' primary wrongs"). More importantly, the SAC details specific affirmative acts by Defendants to conceal their wrongdoing, including the use of technological measures to hide their scheme within apparently legitimate businesses and false statements both about the design of their businesses, as well as outright denials of wrongdoing. (*See* SAC ¶¶ 29-31, 60.)

The Defendants' use of deceptive technological measures as alleged in the SAC creates, at a minimum, a question of fact as to whether those measures fraudulently concealed their wrongdoing prior to June 2007. *See, e.g.*, *Conmar*, 858 F.2d at 505 (allegations that defendant filed false customs forms was sufficient to assert fraudulent concealment at summary judgment stage); *In re Petroleum Prods.*, 782 F. Supp. at 490 (allegations that defendants established network to surreptitiously contact each other using leased WATS lines rather than long distance telephone calls sufficient to assert fraudulent concealment). Similarly, Defendants' multiple denials of wrongdoing and false descriptions of how their business models functioned create, at a minimum, a question of fact as to whether eBay's reliance on such statements was reasonable. *Conmar*, 858 F.2d at 505 ("An affirmative act of denial … is enough [to show fraudulent concealment] if the circumstances make the plaintiff's reliance on the denial reasonable.").

Given the circumstances, eBay acted with reasonable diligence to uncover any potential claims. It retained CJ to prevent and detect fraudulent activity (SAC ¶ 20), it promptly discussed with Defendants the few questions that arose while their fraudulent schemes were ongoing (*see id.* ¶ 60), and it took prompt action to analyze the data and uncover the violation once the schemes were discovered (*id.* ¶¶ 52-57). Given the paucity of any suspicious facts that would have led eBay to investigate more thoroughly, whether its diligence was reasonable is at least a question of fact inappropriate for resolution on a motion to dismiss. *Low*, 2003 WL 25678880, at *5 ("[T]he reasonableness of Plaintiff's reliance and the reasonable diligence of his inquiry are questions of fact not susceptible to resolution on a motion to dismiss."). The TD Defendants have not met their burden to demonstrate that eBay's claims are barred by statutes of limitations.[19]

D. The PSA's Forum Selection Clause Is Not Cause for Dismissal

Defendants assert that the forum selection clause in the PSA submitted with their motions should deny eBay the right to bring this lawsuit in this Court. But, as discussed in detail above, there is a substantial question about the authenticity and effectiveness of that document, rendering it inappropriate for consideration on a motion to dismiss. (*See* Section (A)(1), above.) Defendants' assertions in the CJ Action and in their discovery responses in this case have created a question of fact as to whether eBay can be bound to the forum selection clause in the June 2005 PSA, which must be resolved in eBay's favor. Moreover, even if the PSA were valid and applicable to eBay as a third-party beneficiary, it should not govern here because the User Agreement, rather than the PSA, governs the relationships and actions at issue in this litigation. For both of these reasons, Defendants' claims of improper venue must be rejected.

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[19] Even assuming that the statute of limitations for eBay's RICO claim was not tolled under the discovery rule and fraudulent concealment doctrine, the TD Defendants are incorrect in stating that eBay's RICO claim is not entitled to "separate accrual." (TD Mot. at 17-18.) "Separate accrual" would apply to the RICO claim because each cookie stuff by the defendants was "a new and independent act" causing a separate injury. *Molus v. Swan*, 2007 WL 2326132, at *7 (S.D. Cal. Aug. 13, 2007) (finding separate accrual where each invoice sent by defendants that "demanded money for work allegedly not performed" was a "new bill, rather than a reaffirmation of an earlier due invoice").

1. Defendants' Discovery Responses and Disavowal of the PSA Have Created an Issue of Fact as to Whether It Controls Here

As explained in Section (A)(1) above, the TD and KFC Defendants have repudiated the binding effect of the PSA in the CJ Action, no Defendant has asserted in this action that the unsigned PSA attached to the motions is binding and enforceable, no Defendant has produced a copy of any PSA through discovery despite document requests requiring such production, and certain Defendants have denied that they participated in eBay's AMP at all. Consequently, the unsigned PSA attached to Defendants' motions cannot serve as a basis for dismissal or transfer. "[I]n the context of a Rule 12(b)(3) motion based upon a forum selection clause, the trial court must draw all reasonable inferences in favor of the non-moving party and resolve all factual conflicts in favor of the non-moving party." *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1138 (9th Cir. 2004). This approach is justified because a motion to dismiss based on a forum selection clause has a "dramatic effect on the plaintiff's forum choice." *Id.* at 1139. This principle is all the more significant where, as here, Defendants seek to deny eBay its choice of forum based on an alleged contract to which eBay is not a party.

Because, as this Court previously ruled, eBay has established that venue is proper in this District absent an enforceable forum selection clause requiring venue elsewhere (Feb. 24, 2009 Order at 5), the motions to dismiss for improper venue must be denied.

2. The User Agreement, Not the PSA, Governs the Access to eBay's Website That Is the Basis for eBay's Claims

Even if the unsigned PSA (or some other PSA) were enforceable between Defendants and CJ, the forum selection clause in that agreement would not govern this lawsuit. Rather, the User Agreement entered into between eBay and the Defendants governs the behavior at issue in the SAC. In its February 24, 2009 Order, this Court granted the Non-DPS Defendants' motion to dismiss for improper venue, stating, "the FAC does not explain how violation of the user agreement is unrelated to the alleged breach of the PSA or why the PSA should not be considered the primary and controlling agreement." (Feb. 24, 2009 Order at 7.) The SAC fully responds to this ruling by including a number of new allegations that establish the primacy of the User Agreement.

In addition, Defendants make the misguided contention that the "linking" permitted under the PSA constitutes "access" to eBay's site, and that all of eBay's claims must arise out of the PSA because it is through the PSA that commissions were awarded to the Defendants. But "linking" does not constitute "access." And it is clear that linking to eBay's site as discussed in the PSA does not require any access to the eBay website by Defendants. Moreover, Defendants' improper access caused damage to eBay beyond the payment of improper commissions to Defendants, and therefore eBay's claims do not arise out of the PSA.

a. The User Agreement Governs eBay's Claims

The fundamental premise of this lawsuit is that Defendants caused unauthorized access to eBay's website by manipulating the computers of a massive number of third parties:

> DPS and KFC each accomplished their cookie stuffing through software programs and/or code that, unbeknownst to the user, redirected the user's computer to the eBay website without the user actually clicking on an eBay advertisement link, or even becoming aware that they had left the page they were previously viewing.

(SAC ¶ 25.) The SAC further alleges that this improper access is directly attributable to Defendants:

> DPS and KFC caused the user's computer to access eBay's computers in an unauthorized way and/or to exceed the authorized access to eBay's computers. Because DPS and KFC caused this access through and without the knowledge or active participation of those users, the access of any such user's computer to eBay's site is attributable to DPS and KFC.

(*Id.* ¶ 26.) The SAC goes on to explain that the "only authorization given to the Defendants to access eBay's site in any manner was by way of eBay's User Agreement." (*Id.*) Finally, the majority of Defendants' unauthorized access ***never*** had any connection, let alone a primary connection, to the PSA because that access, while violating the User

Agreement, "did not cause the improper payment of a commission and did not involve the performance by CJ of any obligations under any contract it had with any of the parties to this action." (*Id.* ¶ 33.) This is because a majority of the "cookie stuffs" caused by Defendants did not result in a Revenue Action, so no PSA was ever implicated. (*See id.*)

An affiliate's access to eBay's site was not authorized, covered, or contemplated by the PSA. Instead, the PSA establishes a generic "Performance Marketing Program" in which a "publisher" (e.g., Defendants) refers a "visitor" (e.g., a user) to an "advertiser" (e.g., a company like eBay):

> A "Performance Marketing Program" … is where a person, entity, affiliate or its agent operating "Web site(s)" (internet domain, or a portion of a domain) and/or other promotional methods to drive traffic to another's Web site or Web site content ("Publisher") may earn financial compensation ("Payouts") for "Transactions" (actions by Visitors as defined by the Advertiser) referred by such Publisher ***via an action made by a "Visitor" (any person or entity that is not the Publisher or the Publisher's agent)*** through an internet connection ("Link") to a Web site or Web site content operated by another person or entity ("Advertiser").

(Compendium, Ex. 2 at 1 (emphasis added).) In other words, the only access to a website operated by an Advertiser contemplated by the PSA is "via an action made by a 'Visitor,'" and a "Visitor" is expressly defined as anyone who is ***not*** a Publisher or its agent. In fact, the PSA does not contemplate any access at all by a Publisher to an Advertiser's website, and therefore does not contemplate Defendants' unauthorized access of eBay's site by the manipulation of third parties' computers.

And contrary to Defendants' arguments, eBay's claims are not limited to commissions improperly paid to Defendants. eBay's CFAA claim, for example, alleges damage and loss for all of Defendants' unauthorized cookie stuffing, whether or not Defendants' improper access resulted in a subsequent Revenue Action with associated payments under the PSA. (SAC ¶ 30.) Similarly, eBay alleges damages and loss under California Penal Code § 502 for Defendants' unauthorized access to eBay's site, whether or not commissions were paid under the PSA as a result of those actions. (*Id.* ¶ 79.) eBay's claims rest on the totality of Defendants' massive operation to stuff millions of cookies by accessing eBay's site and servers; eBay's claims are not limited to the minority of those illegal accesses that resulted in Revenue Actions that might involve performance by CJ under any agreement with Defendants. The SAC, moreover, seeks recovery for behavior reaching back to 2003 for the DPS Defendants and 2004 for the TD and KFC Defendants—long before the supposed effective date of the 2005 PSA. (*Id.* ¶¶ 40-41.) And the SAC seeks recovery from individuals—the Dunnings, Mr. Hogan, and Doe defendants—who never claim, let alone provide evidence, to be parties to any PSA.

In contrast to the PSA, the User Agreement explicitly governs access to eBay's website ("The following describes the terms by which eBay offers you access to our services"). (Compendium Ex. 7 at 1.) The User Agreement includes specific limitations on access in a section entitled "Access and Interference." (*Id.* at 3.) This section includes prohibitions that are directly violated by Defendants' actions as alleged in the SAC. Those prohibitions including the following:

> You agree that you will not use any … automated means to access the sites for any purpose without our express written permission.
>
> [Y]ou agree that you will not … take any action that imposes or may impose (in our sole discretion) an unreasonable or disproportionately large load on our infrastructure …
>
> [You agree that you will not] interfere or attempt to interfere with the proper working of the sites or any activities conducted on the sites …

(*Id.*) Defendants' cookie stuffing schemes, as alleged in the SAC: (1) used automated means (software programs and/or code) to access eBay's site without permission; (2) imposed disproportionately voluminous and unreasonable amounts of unsolicited and unwanted access to eBay's site in order to obtain a much smaller percentage of unwarranted commissions; and (3) interfered with the proper working of activities conducted on eBay's site, including, but not limited to, the AMP.

The User Agreement also contains a forum selection clause (entitled "Law and Forum for Disputes"). Contrary to arguments made by the KFC Defendants, the User Agreement's forum selection clause, read in context, applies to all parties to the agreement, including eBay: "[Y]ou and eBay agree that ***we*** will resolve ***any claim or controversy*** at law or equity that arises out of this Agreement or our services in accordance with one of the subsections below." (Compendium, Ex. 7 at 4.) Two subsections follow: one that allows for the optional resolution of disputes under $10,000 through arbitration, and the other requiring the parties to submit to jurisdiction in Santa Clara County, California, where this Court is located. (*Id.*) While the User Agreement, because it is in the form of a "click-through" agreement and for clarity, addresses the user's commitment ("You agree"), the preceding paragraph, as quoted above, makes clear that the contract binds both eBay and the user to the forum selection clause.

Moreover, user agreements are binding contracts and, even if not expressly entered into by third parties, they put all parties on notice that access to a particular site is conditioned upon the limitations expressed in the agreement. Defendants' claims that the User Agreement cannot control venue because it is "generic," because it is entered into by all users of eBay's site, or because it is superseded by the PSA are meritless. In fact, in analogous cases involving unauthorized access to websites by companies employing "web crawlers" or "robot scrapers," user agreements have been routinely held to govern terms of access. For example, in *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000), a case cited by the TD Defendants, the court granted eBay's request for a preliminary injunction against defendant's use of "scrapers"—automated computer programs that would connect with and search eBay's site—even though there was no evidence that the defendant had agreed to comply with the user agreement. The court explained that eBay's written restrictions governed the terms of access:

> BE argues that it cannot trespass eBay's website because the site is publicly accessible. BE's argument is unconvincing. eBay's servers are private property, conditional access to which eBay grants the public. eBay does not generally permit the type of automated access made by BE. In fact, eBay explicitly notifies automated visitors that their access is not permitted.

Id. at 1070. Similarly, in the recent decision *Facebook, Inc. v. Power Ventures, Inc.*, 2009 WL 1299698, at *3-4 (N.D. Cal. May 11, 2009), the Court found that a complaint adequately set forth allegations based on unauthorized access where the defendants, by operating scrapers on Facebook's website, violated the terms of Facebook's user agreement. Here, as in those cases, the SAC alleges claims based on access specifically prohibited by the terms of the User Agreement.

In sum, the SAC alleges that all of the claims against Defendants are based on violations of the access restrictions contained in eBay's User Agreement. The PSA, by contrast, sets out terms for a generic "Performance Marketing Program" that expressly does not contemplate access of an advertiser's site by the Defendants. The User Agreement is no different than similar agreements that are routinely held to control website access. Because it governs the specific behavior that is the basis for eBay's claims, the User Agreement and its forum selection clause are controlling with regard to venue selection in this case.[20]

b. The PSA's Permission of "Linking" Is Not Equivalent to Access

The TD Defendants mistakenly claim that the PSA authorizes them to "link" to eBay's site and thereby permits access. But this misconstruction of the term "link" is inconsistent with both common usage and the provisions of the asserted agreements. Simply put, linking is not access, and this question of contract interpretation must be resolved in eBay's favor at the motion to dismiss stage.

Putting aside that the PSA cannot be considered on the current motions to dismiss, the TD Defendants assert that its authorization for linking gave them the right to access eBay's site. As purported proof on this point, they point to the definitions for "linking" found in the PSA and in the MSA between eBay and CJ. The PSA defines a "Link" as "an Internet connection to a Web site" operated by an Advertiser (e.g., eBay).

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[20] The KFC Defendants make the specious argument in their motion that eBay's discovery requests evidence the applicability of the PSA because they request information about the AMP and do not reference the User Agreement. (KFC Mot. at 10-11.) But the fact that eBay has styled some of its discovery requests with reference to the AMP is in no way determinative of the question of what agreement governs eBay's claims, and Defendants have cited no authority for such a proposition.

(Compendium, Ex. 2 at 1.) The MSA defines "Link" as "a hyperlink or click from a Publisher Web site as outlined" in the PSA. (Kennedy Decl. Ex. 19, ¶ 1.15.) But both the PSA and MSA make clear that the only access to eBay's site is to occur when a user—not the publisher—employs that link to access eBay's site. For example, the PSA explains that a referral is made "via an action made by a Visitor … ***through*** an internet connection ('Link')." (Compendium, Ex. 2 at 1 (emphasis added).)

In other words, a "link" under the PSA is a method by which Publishers promote access by Visitors. Access by a Publisher, in contrast, is specifically placed outside of the PSA's intended reach by its definition of "Visitor": "any person or entity that is not the Publisher or the Publisher's agent." (*Id.*) The PSA's references to "linking" therefore do not encompass Defendants' (unauthorized) access to eBay's website and do not support the argument that eBay's claims fall under the control of the PSA.

Moreover, the MSA specifies that eBay itself would provide the "Link" that the Publisher would use—in other words, the mechanics and visual appearance of the link were eBay's and were to be sublicensed to the Publisher. The Publisher would simply take the link that was provided by eBay and place it into the Publisher's own Internet environment (no different than a magazine publishing a print ad provided by an advertiser). (Kennedy Decl. Ex. 19, ¶ 6.1.) Access to eBay's site by the Publisher is not part of the process of providing advertising services per these agreements.

Common usage confirms that linking is not access. The *Modern Dictionary of Electronics* defines "Hyperlink" as follows: "On a computer screen, a colored section of text (usually blue) that, when clicked, takes one to another web site." Rudolf F. Graf, *Modern Dictionary of Electronics* 357 (7th ed. 1999); *see also Microsoft Computer Dictionary*, Microsoft Corp., at 260-61 (5th ed. 2002) ("Hyperlink," "*also called* link" is defined as "[a] connection between an element in a hypertext document, such as a word, a phrase, a symbol, or an image, and a different element in . . . another document. . . . The user activates the link by clicking on the linked element.").

A link is akin to a set of directions to a person's house or, simply, the address of that house. A link is not, however, permission to enter that house. A click requires the physical act of clicking a mouse button by a user. As is clear from the PSA, the only "clicking" anticipated by the AMP program is by "any person or entity that is not the Publisher." In sum, nothing in any allegedly AMP-related contract governs access to eBay's site by Defendants. Thus, Defendants' only right to access eBay's site was by virtue of the User Agreements. At the very least, this issue must be resolved in eBay's favor on a motion to dismiss.

E. Transfer to the Central District Is Inappropriate

The TD Defendants' and DPS Defendants' motions to transfer pursuant to 28 U.S.C. § 1404(a) should be denied because the relevant factors either weigh against transfer or are neutral.

1. Plaintiff's Choice of the Northern District Is Presumptively Determinative

This Court has noted that "there is a strong presumption in favor of the plaintiff's choice of forum, which should not be disturbed unless the balance is strongly in favor of the defendant." *Hua v. MEMC Elec. Materials, Inc.*, 2009 WL 1363545, at *6 (N.D. Cal. May 14, 2009) (internal citations omitted). eBay's choice of the Northern District was not the result of forum shopping, but rather was the logical choice for a plaintiff headquartered in San Jose. (SAC ¶ 17.) *Safarian v. Maserati N. Am., Inc.*, 559 F. Supp. 2d 1068, 1071 (C.D. Cal. 2008) (denying motion to transfer and deferring to plaintiff's choice of forum because of lack of forum shopping). In both of the cases cited by the DPS Defendants, by contrast, the plaintiff either was not a resident of the chosen forum or had only recently become a resident. *See Unisys Corp. v. Access Co.*, 2005 WL 3157457, at *2, 4 (N.D. Cal. Nov. 23, 2005) (finding that *Unisys Corp.* was forum shopping); *Rowsby v. Gulf Stream Coach, Inc.*, 2009 WL 1154130, at *1-2 (C.D. Cal. Feb. 9, 2009) (noting that Rowsby had only recently moved to California).

The Northern District also has a significant connection to the activities alleged in this suit. eBay alleges that Defendants defrauded it through a scheme that caused unknowing web users to access eBay's computers in San Jose without authorization. (SAC ¶ 17.) *Milton v. TruePosition, Inc.*, 2009 WL 323036, at *4 (N.D. Cal. Feb. 9, 2009) (holding plaintiff's choice of forum accorded deference because much of the operative facts occurred in plaintiff's chosen forum).

The TD Defendants assert, without support, that eBay's choice of forum is "effectively neutralized" by the PSA forum selection clause. (*See* TD Mot. at 7.) But a plaintiff's choice of forum is important regardless of the presence of a forum selection clause, and such a clause is merely one of many factors in determining whether to transfer venue. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988); *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000). Indeed, courts in the Ninth Circuit have found that other factors in the transfer analysis can outweigh a forum selection clause. *Jones*, 211 F.3d at 498-99; *Khedouri v. Shell Holdings, Inc.*, 2009 WL 981982, at *3 (D. Ariz. Apr. 13, 2009); *see also Florens Container v. Cho Yang Shipping*, 245 F. Supp. 2d 1086, 1093 n.10 (N.D. Cal. 2002) ("forum selection clauses are not dispositive when deciding motions for convenience transfers").

As discussed above, Defendants have created factual disputes regarding any PSA. In addition, both the TD and KFC Defendants have previously argued that any PSA forum selection clause should not apply to them. Those Defendants moved to transfer the CJ Action—which specifically alleged breach of the PSA—from Los Angeles County to Orange County Superior Court. In so doing, Defendants Todd Dunning and KFC argued, contravening the forum selection clause they now embrace, that they had "no formal contacts with Los Angeles County relevant to anything in this lawsuit and nothing that establishes venue in [Los Angeles]." (Kennedy Decl. Ex. 20 at 4.) Defendants should not be permitted to rely on contradictory litigation positions to their advantage.

Moreover, as explained in Section (D)(2) above, eBay's User Agreement provides the operative forum selection clause. A choice of forum between Defendants and non-party CJ cannot trump the choice of forum made directly between eBay and Defendants. Nor are the cases cited by the DPS Defendants to the contrary, because those cases deal with forum selection clauses in contracts between the two parties to the litigation. *See Unisys Corp.*, 2005 WL 3157457, at *4; *Rowsby*, 2009 WL 1154130, at *2.

2. The Northern District Is Convenient for Witnesses

The Northern District is the most convenient district for both party and non-party witnesses. All but one of the witnesses listed by eBay and a large number of those listed by Defendants are current or former employees of eBay. (Kennedy Decl. Exs. 21-22.) All of the known eBay witnesses are residents of the Northern District. (Sand Decl. ¶¶ 4-6.) The TD Defendants' claim that "CJI's trial list identifying 24 CJI employees" is "[m]ost informative" is irrelevant because the TD Defendants' initial disclosures identify only a subset of those supposed CJ witnesses and there is no evidence that any of those supposed CJ employees reside in the Central District. (Kennedy Decl. Exs. 23-25.)[21] Nor have the TD Defendants provided CJ's supposed trial list.

eBay agrees that some of the non-party witnesses likely to be called in this case are employees of CJ, which has places of business in Santa Barbara and San Francisco. (Kennedy Decl. Ex. 26.) To the extent that witnesses from CJ's Santa Barbara office may be called, however, travel to the Northern District is not significantly more inconvenient than travel to Los Angeles, much less Santa Ana. And any CJ witnesses are subject to the Court's subpoena power whether the case is tried in the Northern or Central District. This factor weighs in favor of retaining jurisdiction in the Northern District.

3. The Northern District Is Convenient for All Parties

The Northern District is at least as convenient as the Central District for the combination of parties of this action. If this case were transferred to the Central District, it would be assigned to either the Southern or Western Divisions. *See* C.D. Cal. Gen. Order 98-03(1)(B)(i-ii). If the case were assigned to the Western Division in Los Angeles, the DPS Defendants would have a drive from their residence in San Diego of between one hour and 46 minutes and two hours and 40 minutes, depending on traffic.

[21] Mr. Foreman's declaration does not state that the witnesses reside in the Central District, and there is no reason to conclude that he has personal knowledge of their purported residences.

(Kennedy Decl. Ex. 27.) The TD and KFC Defendants would have a drive of between one and two hours, depending on traffic, to that same courthouse from their residences in Laguna Niguel and Aliso Viejo. (Kennedy Decl. Exs. 29-30.) If this case were assigned to the Southern Division, the DPS Defendants would have a drive of nearly one and a half hours to the courthouse in Santa Ana. (Kennedy Decl. Ex. 28.) And although Santa Ana is closer to the TD Defendants' and KFC Defendants' residences, the KFC Defendants have not requested a transfer of venue.

These driving times in the Central District are not substantially different from the time required for Defendants to fly to San Jose. (Kennedy Decl. Exs. 31-32 (approximately one hour and twenty minutes from San Diego to San Jose, and one hour and fifteen minutes from Santa Ana to San Jose).) And eBay, of course, is a short drive from the San Jose courthouse.

Although transfer to the Central District would provide Defendants with the convenience of avoiding flights—at least for appearances where they could not appear telephonically, which they have already done in this case—"a transfer should not be granted if the effect is simply to shift the inconvenience to the party resisting the transfer." *Hua*, 2009 WL 1363545, at *3. This ground therefore does not warrant transfer.

4. The Northern District Is Familiar with This Case and Has a Local Interest in Hearing It

eBay commenced this case in August 2008. This Court therefore has over nine months of experience with this case, which includes two rounds of dispositive motions that have required briefing and analysis of the specific and highly technical details of Defendants' fraudulent cookie stuffing scheme. In light of this Court's experience, retaining this case in the Northern District would conserve judicial resources.

This Court also has an interest in hearing this case, which involves a plaintiff native to the Northern District. As this Court recently noted, local interest in a controversy "ordinarily attaches where the forum's law will apply to claims brought by a resident plaintiff, and the forum has an interest in interpretation of its law by a local court." *Hua*, 2009 WL 1363545, at *7. eBay, an important member of the local community in terms of employment and tax base, alleges that Defendants defrauded it of significant amounts of money over several years, by accessing eBay's computers located in San Jose. (SAC ¶ 17.) Thus, the Northern District has a local interest in retaining this suit. *Hua*, 2009 WL 1363545, at *7.

Each of the above factors is either neutral or weighs against transfer. And Defendants concede that the additional factors of location of evidence, consolidation with other claims, court congestion and conflict of laws are neutral. (TD Mot. at 9-10; DPS Transfer Mot. at 13.) Defendants have therefore failed to meet their burden of demonstrating that transfer is warranted pursuant to 28 U.S.C. § 1404(a). The TD Defendants' motion to dismiss should be denied on this ground, and the DPS Defendants' motion to transfer should be denied in its entirety.

F. **Defendants Have Improperly Raised New Arguments Not Made in Their First Round of Motions to Dismiss**

Finally, and in addition to the deficiencies noted above, two of the arguments on which Defendants heavily rely in their latest round of motions are improper because they were not raised in Defendants' first motions to dismiss. Federal Rule of Civil Procedure 12(g) requires a single pre-answer motion to dismiss in which the defendant must assert all Rule 12 defenses and objections that are then available. Fed. R. Civ. P. 12(g); *Chilicky v. Schweiker*, 796 F.2d 1131, 1136 (9th Cir. 1986) ("[O]mitted defenses cannot be raised in a second, pre-answer motion."), *rev'd on other grounds*, 487 U.S. 412 (1988).

Thus, Defendants were required to argue in their initial motions that (1) eBay's claims are barred by the PSA's contractual limitations period, and (2) eBay's claims are barred by the applicable statutes of limitations. Defendants now argue that eBay terminated its affiliate relationship with Defendants in June 2007 and triggered the limitations provision. Setting aside all of the flaws in this argument, Defendants were aware of the supposed basis for this argument when they filed their original motions. (*See* Kennedy Decl. Ex. 18 at 3 (eBay "refused to reimburse CJ the funds it paid to KFC" in

June 2007); BD Mot. to Dismiss FAC at 5 (citing to Second Amended Complaint in CJ Action, which contains allegations that eBay refused to reimburse payments to CJ for Defendants in June 2007).) Defendants cannot now raise this new argument.

Similarly, when the TD Defendants filed their first motion to dismiss, they had all the facts necessary to support the separate argument that eBay's claims are barred by the applicable statutes of limitations. Having failed to raise the argument in their first motion, the TD Defendants now appear to base their statute of limitations argument on eBay's allegations in the SAC regarding when Defendants' cookie stuffing scheme began. (*See* TD Mot. at 14, 19.) But the FAC pled that the Dunning Defendants caused harm and loss to eBay from at least December 2004, even though the damage was not discovered by eBay until June 2007. (FAC ¶¶ 38, 44, 52.) Thus, at the time the TD Defendants filed their first motion to dismiss, they could and should have raised the argument that eBay's claims were barred by the statutes of limitations.

To permit the Defendants to raise new arguments in *seriatim* motions to dismiss wastes judicial resources and creates an unfair strategic advantage. *See Sprint Telephony PCS, L.P. v. County of San Diego*, 311 F. Supp. 2d 898, 905 (S.D. Cal. 2004); *see also Skrtich v. Thornton*, 280 F.3d 1295, 1306 (11th Cir. 2002) (disallowing second Rule 12(b)(6) motion for failure to state a claim where the first motion omitted a defense then available). Defendants' new arguments should be disregarded on this ground alone.

IV. CONCLUSION

For the foregoing reasons, each of Defendants' motions to dismiss and motions to transfer should be denied in their entirety.

DATED: June 5, 2009

DAVID R. EBERHART
SHARON M. BUNZEL
COLLEEN M. KENNEDY
O'MELVENY & MYERS LLP

By: /s/ David R. Eberhart
DAVID R. EBERHART

Attorneys for Plaintiff eBAY INC.